LIMITATIONS UPON THE RIGHT OF WITHDRAWAL FROM PUBLIC EMPLOYMENT.

THE law of "public callings," although a very interesting branch of legal knowledge, and one rapidly assuming great importance in connection with the development of our economic system, has received only partial and fragmentary treatment from legal writers, and still furnishes a fruitful field for investigation. The present writer has already published certain opinions and authorities on the question of what constitutes a public calling.[1] In this article it is proposed to discuss one of the incidents of such employments, — the duty, imposed by the law under certain circumstances, of continuing to carry on a public calling.

It is undoubtedly true — and allusion is made to it in the opinion in Munn *v.* Illinois[2] — that where a public right in property or to service arises from a voluntary holding out of the property or the service to the public, it may ordinarily be terminated by a withdrawal of the offer of public use. One who owns a hotel may go out of the hotel business and use the building for his private dwelling; or a wagoner who is a common carrier may cease to be a common carrier, and resume exclusive use of his vehicles for his domestic purposes.

This rule is, however, obviously subject to the qualification that one cannot abruptly, and without reasonable opportunity to the public to change their own affairs accordingly, so terminate his relations with the public. For example, an innkeeper could not lawfully put a sudden end to his business in the middle of a winter night, nor a common carrier suddenly leave his occupation and abandon his passengers or freight by the roadside; and it would seem to be true that the character of property, in a given instance, may be such, or the dealings with the public may have become of such character and so intricate, that it may not be possible for a very long period, and perhaps may not be possible at all, to withdraw the property from the public right.

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[1] In a pamphlet entitled "The Coal Mines and the Public," published by the J. B. Millet Co., Boston, and an article entitled "A Word More about the Coal Mines" in the "Green Bag" for December, 1902.

[2] 94 U. S. 113.

If this suggestion is thought to go a long way, it may be answered that it goes no further than the accepted doctrines of custom and dedication. The broad proposition that a man, by encouraging the public to rely upon a certain use of his property, may find himself unable to withdraw it from that use, is already firmly established in the law. Furthermore, the theory of permanency of public rights in cases of the particular kind under discussion, that is, cases of public employment, is not now suggested for the first time. For example, in the case of Allnut *v.* Inglis,[1] Lord Ellenborough suggested, as at least admitting of considerable doubt, the question whether a public warehouse owner might not be bound to continue indefinitely the existing application of his property to a public use.

It cannot be said, however, that the law has as yet taken definite shape on the broad question thus presented. But when certain additional factors are introduced, as when the public servant in question stands in a peculiar relation to the state through the enjoyment of governmental privileges, or when the withdrawal proposed is temporary or incomplete, authority is less meagre. Before proceeding to examine these situations in detail, it will be well to consider a few general principles.

The public employment about which the largest number of cases has arisen, with a correspondingly complete elaboration by successive decisions of its legal relations to the public, is that of the common carrier. It is there accordingly that we shall find the most plentiful illustrations of the principles applicable to the present discussion. It may be admitted at the outset that one of the incidents attaching to the business of the common carrier, as well as to that of the innkeeper, does not apply equally to all other employments of the class under discussion. This incident, belonging to the carrier or the innkeeper in his capacity as a bailee, is his liability as an insurer for goods in his custody. Since there is such an incident, not common to all public callings, we must first inquire what is meant when we say that a telegraph company or a grain elevator company is engaged in a public employment, in the same sense as a common carrier, and subject like the latter to the incidents of such employment.

Underlying the entire law of carriers, from the Year Books down to the present day, are three fundamental duties: first, to carry for

[1] 12 East, 527, 540. See also remark of BAYLEY, J., in same case, at p. 544.

any member of the public at all times and not merely when the carrier is so disposed; second, to give to each applicant exactly the same terms and accommodations as are given to every other under the same circumstances; third, to perform the services of the carrier's employment at reasonable rates. These are the duties alluded to in almost every definition of a common carrier, and they are reiterated in countless cases.[1]

The same duties attach to the calling of the innkeeper, and they are equally familiar to every student of that branch of the law. These are the duties which attach by virtue of the public nature of the calling, and they are the characteristics common to the whole class of public employments.[2]

It is true that a large proportion of the decided cases which go to support this last proposition are concerned with two of the three duties mentioned, — the duty to serve without discrimination, and the duty to serve at reasonable rates. This is to be expected, since for obvious business reasons a person or corporation engaged in a public calling seldom refuses altogether to serve the public, while instances in which rates are claimed to be excessive, or in which a single individual is refused service while others are served, are naturally much more frequent. Again, cases in which a single individual is refused may generally be rested either upon the general duty to serve the public or upon the duty to serve all alike, or upon both grounds; and in such cases there is a natural tendency to choose the second ground for a practical reason. The inquiry exactly how far the general duty to serve the public extends is a broad one, furnishing considerable field for discussion, and the precise limits of that duty in a particular case cannot always be laid down beyond possibility of dispute; while the duty to serve all alike involves a single simple rule, well established and beyond dispute, and the plaintiff who rests his case on that duty has only to show that others have been granted what was refused to him. When he has shown that fact, it follows that, whether or not he could, as a member of the public, have insisted on that

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[1] See for example Chitty & Temple, Carriers, 23; 2 Kent, Com. §§ 598, 599; Hutchinson, Carriers, 2nd ed., § 57 a; Chicago, etc., Ry. Co. *v.* People, 56 Ill. 365, 378; Louisville, etc., R. R. Co. *v.* Wilson, 119 Ind. 352, 358.

[2] State *v.* Nebraska Tel. Co., 17 Neb. 126; People *v.* Hudson River Tel. Co., 19 Abb. N. C. 466; Chesapeake, etc., Tel. Co. *v.* Baltimore, etc., Tel. Co., 66 Md. 399; State *v.* Portland Natural Gas & Oil Co., 153 Ind. 483; Coy *v.* Indianapolis Gas Co., 146 Ind. 655, 659; Allnut *v.* Inglis, 12 East, 527; Griffin *v.* Goldsboro Water Co., 112 N. C. 206. See also Munn *v.* Illinois, 94 U. S. 113.

particular service, he can insist upon it if and so long as it is rendered to others. Clearly, then, when discrimination can be shown, it furnishes the shortest and simplest ground on which to ground the case.

No one, however, who reads carefully the law of public callings as it is laid down in text-books and decisions can fail to see that the general duty to serve the public lies at the bottom of the whole subject. It is assumed by those writers who do not explicitly state it, and is explicitly stated frequently enough to put it beyond doubt. There are numerous decisions expressly rested upon that duty, and there are numerous elaborate *dicta* of able judges which state the law clearly and unmistakably ;[1] while no case has been found in which the existence of such a general duty as an incident of public callings has been questioned or denied. Even in such of the reported decisions as deal more or less with a statute obligation, — such as certain of the cases relating to gas, water, telephone, and telegraph companies, — the right of a particular plaintiff to the company's services has been repeatedly based on the broad ground of a general duty to serve the public, and has repeatedly been said to rest on exactly the same principles as the right to the services of a common carrier.[2]

The duty to serve all, and at all times, is of course subject to some qualifications. Thus, a carrier or an innkeeper may not be liable to one whom he is unable to serve, where his facilities have been exhausted by other applicants. Again, payment may generally be required in advance. But these and some other similar qualifications which might be mentioned, only make the rule a reasonable one without in any degree weakening it. The obligation of the public servant extends, generally speaking, as far as the capacity of his property, but it can extend even so far as to require him to procure and devote to the public use a larger quantity of property than he has chosen to provide. The courts have not yet gone so far as to require a railroad company to provide cars for any possible quantity of traffic; but it is its duty, and the duty has frequently been enforced, to have sufficient cars for all traffic reasonably to be anticipated; and upon notice from an intending shipper the carrier, if without cars, must make reasonable effort to secure them.[3]

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[1] See authorities above cited.

[2] See cases above cited.

[3] Hutchinson, Carriers, 2nd ed., § 292 and cases cited.

Even where it is physically impossible to serve all applicants adequately, it does not follow that any may be refused altogether. The extent to which the duty may be carried is illustrated by a striking case recently decided by the Supreme Court of Indiana.[1] A natural gas company was sued by a resident of the locality which the company supplied, the object of the suit being to compel the company to supply the plaintiff with gas. It was shown in defense that the supply of natural gas available to the company was limited, and was no more than sufficient for the needs of the customers already being supplied. The court held the defense insufficient, and gave judgment for the plaintiff, although the logical effect of the decision would be to require the company in a not improbable event to supply many more persons than the quantity of gas available would properly accommodate. The decision was rested upon the general principle that a company engaged in such a public employment must serve all applicants within the territory of its operation. It was pointed out that a contrary decision might enable those persons who, through priority of application, had first entered into relation with the company, to secure light and fuel of such a kind and on such terms as would give them an unfair advantage over their business rivals. The policy of the law to secure to all the public an equal share of commodities of public importance — a policy carried out in a vast number of cases of many kinds — was the underlying ground of the decision.

The general duty to serve all the public at all times has been emphasized because it lies at the foundation of the present subject. It is evidently only another way of expressing a part of that duty, to say that the service must be regular, and not, so long as the public calling is carried on, subject to interruptions and irregularities either at the caprice of the managers of the business, or as a result of any other cause not constituting a legal excuse.

Before proceeding to our conclusions from the principles that have been stated, two distinctions, already suggested, must be pointed out. The first is the distinction between an individual or partnership engaged in a public employment, an ordinary corporation in a similar employment, and a corporation enjoying a delegation of governmental authority, as for example the right of eminent domain. The second distinction is that between a definite and permanent withdrawal from business, and a temporary or partial withdrawal.

[1] State, *ex rel.* Wood *v.* Consumers' Gas Trust Co., 61 N. E. Rep. 674.

Naturally enough, it is in the case of corporations exercising *quasi*-governmental powers that the law has gone farthest. A corporation chartered by the state incurs by the acceptance of its charter certain obligations to the state in relation to the performance of its functions. In theory, at least, a corporation is chartered only because it is for the public interest that it shall be chartered, and it therefore undertakes a general duty to carry on the business for which it is created. If it fails to do so its charter may be revoked in proceedings at the suit of the state. These principles obviously have a peculiar operation in the case of a corporation chartered to perform a public service; and if there is added a delegation of governmental authority, as by a grant of the power of eminent domain, it is natural to find that the right of the state to insist on the continued performance of the public duties assumed by the corporation, is both positive and extensive.

Accordingly we find in the case of such corporations a respectable amount of authority for the proposition that, so long as the service is needed by the public, the corporation is bound to continue business, provided this can be done without financial loss. The point is by no means settled, but the tendency may be said to be in this direction. The cases are collected in a recent number of the REVIEW.[1]

These cases relate to the right of public service companies to withdraw definitely and permanently from business. As to a similar right on the part of individuals or partnerships, or ordinary corporations, engaged in public callings, authority is meagre. The sentence already quoted from Lord Ellenborough, and somewhat similar suggestions in other cases, together with the analogy of the authorities referred to just above, suggest the possible development of the law. It may at least be said with some confidence that wherever the necessities of the public are seriously involved, reasonable notice and reasonable time for adjustment must be given. Beyond this much will depend on the economic situation in connection with which the question shall first require a settlement.

Turning now to the question of partial or temporary withdrawal, we shall find less difficulty in reaching definite conclusions. An innkeeper could not be said, in the strict sense, to withdraw from the business because he chose to close his inn for a week and enjoy a vacation. A railroad company does not withdraw from the

[1] 15 HARV. L. REV. 363.

business when it is unable to operate its trains because its men have struck and it refuses to grant their demands. At the present moment we are not considering the question of adequate excuse for such temporary stoppage; but it must be obvious that the recognition of an innkeeper's or a carrier's right absolutely to abandon the business of an innkeeper or a carrier is in no way inconsistent with a rule requiring the innkeeper or carrier, so long as, speaking broadly, he is in the business, to conduct it regularly and continuously.

The situation in which this question will most often be presented, and in which its decision will involve the most important consequences, is that which arises in case of a strike. The existence of the duty of regular service, so long as there is no genuine withdrawal from the business, will hardly be questioned, and the discussion must therefore center about the question of excuse. Here again the cases are most numerous in which corporations enjoying special franchise privileges are involved. But it will hardly be doubted that the duty of regular service applies with equal force to all persons engaged in public callings, and unless some special reason can be shown in the nature of the excuse presented, it would seem that the same rules and qualifications ought to apply in all cases. Certain things undoubtedly will excuse one engaged in a public calling from full performance of his usual duties. The familiar examples given in all the text books are "acts of God, and of the public enemy." There are, however, other possible excuses. An unforeseeable rush of traffic has been held to excuse a carrier for delay in shipping goods, and the violent acts of a mob, which could not by any reasonable means have been prevented, have been held to have the same effect. But there seems no basis in the law for saying that a strike as such is any excuse. Thus in Blackstock *v.* New York & E. R. R. Co.,[1] it was held that a strike of the carrier's servants was no defense in an action for damages resulting from delay in carriage. The same doctrine was affirmed in Hall *v.* Penn. R. R. Co.[2]

In People *v.* New York Cen. & H. R. R. R. Co.,[3] a petition for mandamus was brought against the defendant company, based on the fact that, owing to a strike on the part of its employees, the

[1] 20 N. Y. 48.

[2] 1 Fed. Rep. 226. See also Chicago, etc., Ry. Co. *v.* Burlington, etc., Ry. Co., 34 Fed. Rep. 481, 484; Pittsburg, etc., R. R. Co. *v.* Hazen, 84 Ill. 36.

[3] 28 Hun 543.

defendant had for some time forwarded only a small proportion of the freight regularly tendered for carriage. In holding that the company had thus violated its public duties, the court rested its decision in the first instance upon the duties undertaken by the corporation in accepting a charter from the state, the charter being regarded both as imposing a public trust upon the corporation, and as a contract between the corporation and the state. But the case illustrates very well the fact that the obligations which such a charter is construed to impose are derived fundamentally from the general duties of the carrier's employment. Thus, the petition which was filed alleged that the railroad company, since a certain date, had

"*substantially refused to discharge its duties as a common carrier*, and had, to a material degree, suspended the exercise of its franchises by refusing to take freight which had been offered at its stations in the city of New York for transportation, at the usual rates and upon the usual terms."

In commenting upon the petition the court says:

"These allegations are broad enough to show a quite general and largely injurious refusal and neglect to perform the duties of a carrier."

And again:

"We are not able to perceive the difficulties that embarrassed the court below us to the form of a writ of mandamus in such cases. It is true the writ must be specific as to the thing to be done; but the thing to be done in this case was to resume the duties of carriers of the goods and property offered for transportation; that is, to receive, carry, and deliver the same under the existing rules and regulations as the business had been accustomed to be done."

Thus it appears that the duties enforced in that case were exactly the same duties which are enforced in any suit by a private citizen against a common carrier for refusal to receive and carry the plaintiff's goods.

On the question whether the strike afforded any excuse to the carrier, the court said:

"The most that can be found from the petition and affidavits is that the skilled freight handlers of the respondents refused to work without an increase of wages to the amount of three cents per hour; that the respondents refused to pay such increase; that the laborers then abandoned the work, and that the respondents did not procure other laborers competent or sufficient in number to do the work, and so the numerous evils complained

of fell upon the public, and were continuous until the people felt called upon to step in and seek to remedy them by proceedings for mandamus.

"These facts reduce the question to this: Can railroad corporations refuse or neglect to perform their public duties upon a controversy with their employees over the cost or expense of doing them? We think this question admits of but one answer. The excuse has in law no validity. The duties imposed must be discharged at whatever cost. They cannot be laid down or abandoned or suspended without the legally expressed consent of the State. The trusts are active, potential, and imperative, and must be executed until lawfully surrendered, otherwise a public highway of great utility is closed or obstructed without any process recognized by law."

In accordance with this opinion the writ of mandamus was issued. An exactly similar case, resulting in the same decision, was Loader *v.* Brooklyn Heights R. R. Co.,[1] decided in 1895, in which the court, after stating that it was the duty of the company to run cars enough to accommodate the public, proceeded as follows:

"It may not lawfully cease to perform that duty for even one hour. The directors of a private business company may, actuated by private greed or motives of private gain, stop business, and refuse to employ labor at all, unless labor come down to their conditions, however distressing. But the directors of a railroad company may not do the like. They are not merely accountable to stockholders. They are accountable to the public first, and to their stockholders second. They have duties to the public to perform, and they must perform them. If they cannot get labor to perform such duties at what they offer to pay, then they must pay more, and as much as is necessary to get it."

The authorities thus far cited have related to peaceable strikes. It may be thought, however, that when the element of mob violence is added the case takes on a different aspect. Let us see if this is so.

In the first place the cases in which a public service company has been held to be excused for failure in its ordinary duties by the existence of mob violence will be found on examination to turn very sharply on the question of causation. Thus in Hall *v.* Penn. R. R. Co., cited above, the suit was brought for the destruction of certain goods in transit. The court affirmed the proposition of the plaintiff that a peaceable strike would not excuse the company, but finding that the goods had been burned by a mob, held that the

[1] 35 N. Y. Supp. 996.

action of the mob and not the strike was the sole cause of the damage; that is, that the strike alone would not, so far as appeared, have resulted in the damage complained of. Again, in Geismer *v.* L. S. & M. S. R. R. Co.,[1] suit was brought for damage to live stock, caused by delay in transportation. It appeared that, during the progress of a strike, the strikers or their sympathizers had taken possession of the company's engines, and carried off parts of them, and by other acts of violence had made it impossible for the company to operate its trains. In both these cases, and in others of the same sort, the defendant was held to be excused; but in all such cases it will be found that the particular damage in question was, under the evidence, the result of mob violence alone, and would not have resulted simply from the strike.

In most strikes extensive enough to affect the public injuriously, there is a certain element of violence. But it is almost never the case that violence alone causes the cessation of business. At the outset it usually plays very little part, and it is comparatively seldom, if ever, the case that lawlessness goes so far as to render it absolutely impossible to carry on the business. As has been shown, it does not excuse the employer that the men demand unreasonable wages. Neither would it excuse the employer if men refused to work out of sympathy with the strikers. It is only actual prevention by violence, or its equivalent in actual bodily intimidation of men otherwise ready to work, that the cases show to be an excuse.

Again it is to be noted that in the cases cited on the question of violence and lawlessness, the proceeding was an action to recover damages for past injuries. But the question of the duty of one engaged in a public calling in case of a strike may be raised in another way. When a stoppage of business is threatened as a result of a strike, those entitled to be served by the employer by virtue of the public nature of his calling, may seek to prevent the threatened damage to their interests by mandamus, injunction, or receivership proceedings. The first of these procedures is illustrated by some of the cases already cited. The second would be an obviously appropriate remedy wherever its enforcement would not be too complicated.[2] The third might, it would seem, be properly invoked whenever it becomes evident that those in charge of the

[1] 102 N. Y. 563.

[2] See Chicago, etc., Ry. Co. *v.* Burlington, etc., Ry. Co., 34 Fed. Rep. 481.

business are not able to cope with the difficulties which the conduct of their employees has produced. It is not the purpose of this article to argue for the applicability of any particular form of procedure. On the question of receivership the views of the present writer have already been presented to the public.[1] The point here to be made is that when business of a public character is tied up or likely to be tied up by a strike, and the remedy sought by members of the public is preventive rather than compensative, the question of excuse takes on a somewhat different character.

One who has rights in certain property, of which he has not received the benefit in the past, through difficulties with which those in charge of the property have been unable to cope, may be entitled to such action by the courts as will enable him to secure those rights in the future, although he may not have a cause of action for all the damage that he has suffered up to the time of his application to the court. The familiar cases of incompetent management of corporations, unaccompanied by such fraud or negligence as would give a right of action for past losses, furnish a sufficient example. The very effective action of the courts in the Debs case, and in other proceedings at the same time, demonstrated the ability of the United States courts to deal through preventive remedies with conditions of violence which the owners of the property and the local authorities could not meet. It might easily be true that a court would sustain an application for preventive relief, when one who waited till after the damage was done could not recover all he had lost.

Our examples have been drawn chiefly from the business of the railroads, because it is there that cases have most often arisen. But no reason appears why the same principles are not applicable to all public callings; and it is necessary only to read the case of Munn *v.* Illinois,[2] to realize both how many employments are included in that class, and how readily the law will enlarge it as public needs require. It is easy to see, therefore, that the views which the writer has presented are, if correct, of the utmost importance in their bearing on the conflict constantly waging between capital and labor. If it be thought that the recognition of such principles as have been pointed out puts into the hands of the workmen so powerful a club as to risk upsetting altogether the

[1] In the pamphlet above referred to. See also Fishback *v.* Citizens' St. Ry. Co., 4 Nat. Corp. Rep. 9 (Ind. Super. Ct.).

[2] 94 U. S. 113.

economic balance, it may be said in reply that the law has also much to say to strikers and labor organizations. It has already been more than once effectively invoked against them, when they have gone too far, and it is doubtful if they have yet felt the full strength of its hand.

It is to be hoped that the possibilities of legal interference in the case of strikes, both as those possibilities affect the employer and as they affect the workman, may never require to be fully developed. There is a constantly increasing tendency on both sides to meet each other fairly and in a businesslike spirit. Where such a spirit is lacking, there is much to be hoped from the force of public opinion. The great coal strike of last summer, while it brought forcibly home to the people the possibilities of public danger in the struggle of labor and capital, demonstrated also how effectively the people may make their voices heard. But while the tendency to businesslike negotiation, — with the immense saving to both parties which it accomplishes, — and the force of public opinion, may go far toward preventing serious public loss as a result of labor controversies, it is still important for two reasons to realize how the law on the question stands. In the first place public opinion speaks more readily and firmly when it is assured of a basis for its demands in law as well as in justice. Some such assurance, indefinite but real, pervaded the discussion last fall which finally culminated in the settlement of the coal strike. Again, when negotiation and public opinion fail, as they sometimes do, and employers and workmen prepare to fight their battle out, it is infinitely better that they and the public should resort to the law, and come to realize its full power, rather than wait for starvation or violence to bring about a settlement. At least in the case of public employments there can be little doubt that the law is capable of protecting the public from the serious loss which may result while employer and laborer are settling their quarrel.

H. W. Chaplin.